

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suede G. Kelly.

Calpine Eastern Corporation  
Bethpage Energy Center 3, LLC  
Calpine Bethpage 3, LLC

Docket No. EL05-8-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER  
DISCLAIMING JURISDICTION

(Issued December 13, 2004)

**Introduction**

1. In this order, we grant a petition for a declaratory order disclaiming jurisdiction over Bethpage OP, a subsidiary of General Electric Company and Bethpage Energy Center 3, LLC (Bethpage OL), proposed passive beneficial owner and passive owner lessor respectively of the Bethpage III Energy Center (Facility), finding that neither entity is a public utility subject to section 201(e) of the Federal Power Act (FPA).<sup>1</sup> This order benefits customers by ensuring that purely passive entities are not treated as public utilities with regulatory responsibilities to the Commission.

**Background**

2. On October 13, 2004, Calpine Eastern Corporation (CEC), Bethpage OL, and Calpine Bethpage 3, LLC (Calpine Bethpage) (collectively, Applicants) filed a petition

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<sup>1</sup> 16 U.S.C. § 824(e)(2000).

for a disclaimer of Commission jurisdiction under section 201 of the FPA over Bethpage OP and Bethpage OL.<sup>2</sup>

3. This petition concerns a Facility currently under construction in Oyster Bay, New York. This Facility will be an approximately 79.9 megawatt natural gas-fired combined cycle generating plant, with commercial operations scheduled to begin in June 2005. Bethpage OL, a subsidiary of applicant CEC, will own the Facility. Under the plan presented by the Applicants, CEC will sell all of its ownership interest in Bethpage OL to Bethpage OP. Thereafter, Calpine Bethpage will be the exclusive construction agent for the Facility, with responsibility for completing the construction and conducting the startup testing of the Facility. Once the Facility is operational, Bethpage OL will lease the Facility to Calpine Bethpage, along with all rights and contracts affecting its operation and control. Calpine Bethpage will make all decisions concerning the operation of the Facility, will make all sales of test power from the Facility, and will control all sales of power. Bethpage OL will have only a passive interest in the Facility as the passive owner lessor, and Bethpage OP will have a passive interest as the beneficial owner.

### **Notice and Interventions**

4. Notice of this filing was published in the *Federal Register*, 69 Fed. Reg. 62,441 (2004), with comments, protests, and interventions due on or before November 3, 2004. None was filed.

### **Discussion**

5. Applicants request that the Commission determine that Bethpage OP, as a passive beneficial owner, and Bethpage OL, as a passive owner lessor, are not public utilities as defined in section 201 of the FPA. Section 201(b)(1), 16 U.S.C. § 824(b)(1)(2000), states:

The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce . . . . The Commission

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<sup>2</sup> In the same filing, Docket No. EC05-5-000, Applicants request approval for the disposition of jurisdictional facilities under section 203 of the FPA. The Commission's Director of the Office of Markets, Tariffs and Rates, pursuant to authority granted to the Director under § 375.304 of the Commission's regulations, acted on this request in a separate order issued December 3, 2004. See 18 C.F.R. § 375.307(1)(1)(2004).

shall have jurisdiction over all facilities used for such transmission or sale of electric energy . . . .

6. Section 201(e), 16 U.S.C. §824(e)(2000), states:

The term “public utility” . . . means any person who owns or operates facilities subject to the jurisdiction of the Commission.

7. The application of section 201 to entities with a passive interest in jurisdictional facilities has been addressed by the Commission on numerous occasions.<sup>3</sup> In these cases, the Commission employs a two-step analysis for determining whether a financial interest in jurisdictional facilities constitutes sufficient ownership that holding such interests would result in a finding of “public utility” status under the FPA. Under this precedent, the Commission first determines whether the passive participant will operate the facilities. The Commission then determines whether the passive participant is otherwise in the business of producing or selling electric power.<sup>4</sup> The Commission has concluded that it would be inconsistent with the FPA to label the passive participants in certain financial arrangements as public utilities, and subject them to the Commission’s jurisdiction, where these participants hold only equitable or legal title to the electric facilities, and are removed from the operation of the facilities and the sale of power.

8. Applicants state that once CEC sells its ownership interest in Bethpage OL to Bethpage OP, Calpine Bethpage will become the exclusive construction agent of the Facility. Calpine Bethpage will control the day-to-day construction and testing of the Facility, will make all sales of test power from the Facility, and will control all revenues from the sale of power. Neither Bethpage OP nor Bethpage OL will be actively involved in these activities. Bethpage OP will have passive interest in the Facility as the beneficial owner, but will have no authority over the daily operation of the Facility. Similarly, Bethpage OL will be the passive owner lessor in this enterprise. It holds legal title to the Facility, but will not have any authority over the Facility’s daily operations. Bethpage OP and Bethpage OL further state that once the Facility is fully operational, they will not be engaged in the business of producing, selling or transmitting electric power. All of these business activities will be controlled by Calpine Bethpage.

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<sup>3</sup> See *Pacific Power & Light Co.*, 3 FERC ¶ 61,119 (1978); *El Paso Electric Co.*, 36 FERC ¶ 61,055 (1986); *City of Vidalia, Louisiana*, 52 FERC ¶ 61,199 (1990); *Oglethorpe Power Corp.*, 77 FERC ¶ 61,334 (1996); *MGE Energy, Inc.*, 109 FERC ¶ 61,175 (2004).

<sup>4</sup> *Pacific Power* at 61,337.

9. In light of the facts presented in the petition and consistent with Commission precedent, we find that the role of Bethpage OL, as passive owner lessor, and Bethpage OP, as passive beneficial owner, is limited to that of passive investors that do not exercise control or decision-making authority over the Facility.<sup>5</sup> Accordingly, neither Bethpage OL nor Bethpage OP would be a public utility within the meaning of section 201(e) of the FPA.

**The Commission orders:**

Applicants' request that the Commission disclaim jurisdiction over Bethpage OP as passive owner participant and Bethpage OL as passive owner lessor in this proceeding, based upon the facts presented by Applicants in their petition, is hereby granted.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.

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<sup>5</sup> If this changes so that the passive lessor operates the Facility to make sales of electric energy at the wholesale level, or engages in transmission in interstate commerce, it will become a public utility and will be required to make appropriate filings pursuant to section 205 of FPA, 16 U.S.C. § 824d (2000). *See, e.g. Unicom Investments, Inc.*, 91 FERC ¶ 61,109 at 61,387 n.9 (2000).